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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion and judgment of the court of appeals (Pet. App. 1a-27a)[1] is not yet reported. The Memorandum Opinion and Order of the district court from which appeal was taken (Pet. App. 29a-35a) is reported at 397 F.Supp. 186. Two earlier memorandum opinions on the

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[1] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case. "App." refers to the Appendix filed with this Brief.

same application by a different district judge (Pet. App. 36a-45a) are reported at 386 F.Supp. 639.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1976 (Pet. App. 1a-27a). A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on December 3, 1976 (Pet. App. 28a). The petition for certiorari was filed within 90 days of that date, on January 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether tape recordings of conversations between a President of the United States and his closest aides, produced over a claim of presidential privilege in order to meet "the fundamental demands of due process of law in the fair administration of criminal justice" and thereafter played in open court as evidence in a criminal trial, must be supplied by the court to private parties for radio and television broadcast and for sale in the form of phonograph records and tape cassettes.

STATEMENT

A. The Production and Use at Trial of the Subpoenaed Tape Recordings

On April 18, 1974, the Watergate Special Prosecutor issued a subpoena *duces tecum* to President Richard Nixon requiring the production of tape recordings of a number of confidential conversations between the President and his aides. Mr. Nixon moved to quash the subpoena on various grounds including executive privilege, but the motion was denied by the district court. The

district court ordered the tapes produced for *in camera* inspection to determine which portions, if any, would be released to the Special Prosecutor for use at trial. This Court granted the Special Prosecutor's petition for certiorari before judgment in the court of appeals and affirmed the district court's order requiring the production of the tapes for *in camera* review. *United States v. Nixon*, 418 U.S. 683 (1974). The Court held that the recordings were "presumptively privileged," but that the privilege was overridden under the circumstances by the "demonstrated, specific need for evidence in a pending criminal trial" and the "fundamental demands of due process of law in the fair administration of criminal justice." 418 U.S. at 713.

In compliance with the district court's order, Mr. Nixon produced the requested recordings in July and August of 1974.[2] Judge Sirica then examined each of the recordings and transmitted to the Special Prosecutor those portions he deemed relevant and admissible in evidence.

During the Watergate conspiracy trial, *United States v. Mitchell, et al.*, Cr. No. 74-110 (D.D.C.), selected portions of the subpoenaed tapes were admitted into evidence and played to the jury. A total of some twenty-two hours of conversations were played in the course of the thirteen-week trial. Each time the tapes were played in the courtroom, the jurors and the members of the press and public in attendance were provided with headphones, enabling them to hear the evidence as accurately and conveniently as possible. In addition, printed transcripts of each conversation were

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[2]Certain other recordings had been produced under similar circumstances in November 1973 following the decision of the court of appeals in *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973).

distributed to all those present. No restrictions were placed on the subsequent use of the transcripts or on press reports concerning the recordings played in open court. As a result, the contents of the conversations played to the jury were reported daily in every news medium, and transcripts of the tapes were published in newspapers as well as in book form.

B. The Applications for Copies of the Taped Conversations

Shortly before the trial began, several television news commentators asked Judge Sirica to provide them with copies of the tapes at the time they were played at trial. In a letter dated October 2, 1974 (App. 9-11), Judge Sirica denied the request, citing an attached memorandum of the Chief Judge of the District Court, which reflected the views of the district court judges he had consulted on the matter. The memorandum stated that it was the unanimous view of the judges that: (1) the decision whether to make the tapes available should be left to the trial judge; (2) broadcasting of court proceedings is improper, and making available a tape recording that was played in court is difficult to distinguish from letting a reporter use a tape recorder to record the entire proceeding; and (3) providing verbatim transcripts to the press "would appear to constitute more than adequate disclosure to the public of what the tapes contained."

On November 12, while the trial was still in progress, the three respondent broadcasting companies and respondent Radio-Television News Directors Association filed a joint application before Judge Sirica claiming a right under the First and Sixth Amendments to obtain copies of the tapes being played at trial (App. 12-17). The next day, respondent Public Broadcasting System

joined that application (App. 18-21). Because he was still occupied with the trial, Judge Sirica referred the application to Chief Judge Hart, who in turn referred it to Judge Gesell to consider and report on at an Executive Session of the District Court (App. 17-18). Judge Sirica subsequently entered an order directing the Clerk to assign the application to the miscellaneous civil docket and inviting any persons served with the application to file notice of their positions with respect to the matter (App. 22).

In response, Mr. Nixon filed an opposition to the application (App. 30-39) arguing that (1) the applicants had no right, constitutional or otherwise, to obtain a copy of the actual tape recordings played in evidence; (2) the court had no authority, merely because portions of the tapes had been played in court, to make copies of the subpoenaed recordings available to the public; and (3) public release of the recordings themselves would be contrary to the policies recognized in *United States v. Nixon, supra*, and would intrude upon the privacy of the participants in the conversations. None of the other persons served with the application filed oppositions in the district court, although the Special Prosecutor filed a two-page statement expressing the Government's view of the matter (App. 27-28). The Special Prosecutor stated that while the applicants' claim of a constitutional right to duplicate the recordings was "debatable," the question was one "peculiarly within the discretion of the Court." Because he did not foresee that the rights of the parties to a fair trial would be jeopardized if the application were granted, the Special Prosecutor did not take a position opposing the application. He did state, however, that any order granting the application should provide that the duplication process not "interfere with the orderly presentation of evidence or threaten the integrity of the recordings introduced into evidence."

C. Judge Gesell's Rulings

On November 19, Judge Gesell directed Mr. James F. Davey, the Clerk of the District Court, to prepare an affidavit detailing the mechanical procedures that had been used to reproduce and play the tapes in court, and outlining the factors bearing on the feasibility of further reproduction of those portions of the tapes that had been played to the jury. In his affidavit (App. 23-27), Mr. Davey explained that the conversations played during the trial were contained on some fifty separate tape reels, which had been reproduced from the original tapes after Judge Sirica had excerpted irrelevant or privileged conversations. Only portions of these reels were played to the jury; the parts not played remain confidential. Mr. Davey estimated that to produce a tape recording containing only those portions of the conversations introduced as evidence would require five to seven days' work by a sound recording technician and the participation of someone sufficiently familiar with the tapes to locate and identify the portions that were played in court.

On December 2, respondent Warner Communications, Inc. ("Warner") filed a separate application to copy the tapes, stating its intention to disseminate the conversations to the general public in the form of phonograph records and tape reproductions (App. 39-46). A newspaper account published shortly afterwards reported that Warner planned to produce boxed albums of the presidential conversations and to market a set of selections from the tapes with commentary from George C. Scott, a well-known movie actor (Washington Post, Dec. 26, 1974, at B-1).

Three days later, on December 5, 1974, Judge Gesell entered a Memorandum and Order with respect to the

pending applications (Pet. App. 36a-43a). Judge Gesell found the applicants' claim of a First Amendment right to copy the tapes to be "wholly without merit," noting that the press enjoys no constitutionally guaranteed "right of access" superior to that afforded to the general public and that the press had been permitted to report everything that transpired in the courtroom (Pet. App. 37a). Judge Gesell also held that Mr. Nixon had standing to protest the release of the tapes. On the merits, however, he rejected Mr. Nixon's arguments in opposition to the applications on the ground that the conversations in question had become "public property" (Pet. App. 41a). Accordingly, Judge Gesell stated that the applicants were entitled to copies of the portions of the tapes in issue "if a satisfactory mechanism and procedure can be evolved" for reproducing and distributing them (Pet. App. 43a). The terms of release, the court stated, would have to ensure against "overcommercialization of the evidence" and would have to permit the court to prepare only a single copy of the tapes as played "and then place its subsequent reproduction and distribution in the responsible hands of an organization, agency, or person which, without profit, can, for a defined limited period, assure fair and equitable distribution to all categories of applicants." The court then invited suggestions for appropriate methods of dissemination "[w]ithout in any way indicating whether it is practical or possible" to release copies of the tapes (Pet. App. 42a-43a).

The respondents subsequently filed a memorandum "on implementation of the Court's memorandum and order" (App. 47-55), in which they set forth a proposal for copying the tapes and disseminating the copies in a manner suited to their purposes. Judge Gesell, however, rejected their proposal on the grounds that the respondents' plan had made no provision to minimize commer

cialization or undignified use of the tapes, and that the plan had not provided for a responsible agency or person to administer the copying and distribution process. Accordingly, on January 8, 1975, he denied all the pending applications without prejudice (Pet. App. 44a-45a). Since the Watergate trial had by then been completed, Judge Gesell transferred the matter back to Judge Sirica "for any further action that may be appropriate in the premises at some later date." No appeal was taken from that order.

D. Judge Sirica's Decision

At a status conference held some three months later, Judge Sirica sought the views of counsel as to whether further action on the applications should be postponed pending the disposition of the appeals in *United States v. Mitchell, et al.* The parties submitted memoranda on the question, and on April 4, 1975 Judge Sirica entered a Memorandum Opinion and Order holding that further action on the matter should await the conclusion of the appeals in the criminal case (Pet. App. 29a-35a). The sole question addressed by Judge Sirica, as he noted at the outset, was "the timing of the release, if ever, of certain tapes received in evidence in the case of *United States v. Mitchell, et al.*, CR 74-110" (Pet. App. 29a).

In his memorandum opinion, Judge Sirica observed that, as Judge Gesell had stated previously, there were "several obstacles which must be overcome before the tapes might be released." Judge Sirica wrote that he was "well aware of the many problems that must be resolved before any Presidential tapes might be reproduced and distributed to the public at large," and he added that for the present he was "seriously concerned about the timing of any release or reproduction of the tapes" (Pet. App. 29a-30a). He then concluded that for several reasons the

tapes should not be reproduced for immediate release. First, all four convicted defendants had filed notices of appeal, and should one or more of them prevail, a new jury would have to be empaneled and the case retried. In view of that possibility, Judge Sirica wrote, "the Court still must be careful to protect the rights of the defendants as well as the integrity of the evidence" (Pet. App. 30a). Second, Judge Sirica took note of this Court's admonition in *United States v. Nixon, supra,* that the District Judge should "at all times" accord to presidential records "that high degree of deference suggested in *United States v. Burr.*" The applicants' request for immediate access to the tapes, he wrote, must be viewed "in the light of this solemn responsibility as well as a concern for the rights of the defendants" (Pet. App. 31a). Noting Mr. Nixon's argument that the commercial distribution of the tapes, with possible commentary by journalists or entertainers, would involve "mass merchandising techniques designed to generate excitement in an air of ridicule to stimulate sales," the court concluded that the rights of the Watergate defendants "and many others" might be seriously and permanently damaged if he ordered the immediate release of the tapes (Pet. App. 31a).

The interests advanced by the applicants in favor of immediate release, Judge Sirica stated, were not compelling. Since transcripts of the tapes were freely available at trial, and since no restraints had at any time been placed on reporting what occurred in the courtroom, Judge Sirica concluded that "the argument that the public's 'right to know' presents a compelling reason for granting immediate access to the tapes must be rejected" (Pet. App. 32a).

For these reasons, the district court denied without prejudice the applications for immediate production of copies of the taped conversations. The respondents appealed.

E. The Decision of the Court of Appeals

The court of appeals reversed Judge Sirica by a two-to-one vote, with Judge MacKinnon dissenting (Pet. App. 1a-27a). The court did not base its decision on the constitutional claims asserted by the respondents, but instead held that there exists a "common law right to inspect and copy judicial records," which "extends to exhibits," regardless of their nature (Pet. App. 14a).[3] Exceptions to this common-law right might be devised, the court stated, but only where "justice so requires" (Pet. App. 15a). Accordingly, the court held that the question the district court should have addressed was "whether appellee, who sought to interfere with a fundamental common law right, had sustained his burden of demonstrating that justice required denying access to the court records." Once the question is recast in these terms, the court concluded, "the answer becomes inescapable" (Pet. App. 17a).

The court of appeals first addressed the finding by Judge Sirica that putting the tapes in the hands of broadcasters and record companies might seriously and permanently damage the rights of the criminal defendants in the event a retrial became necessary. The court found unimpressive Judge Sirica's concern about the potential for prejudice

[3]The court of appeals based its conclusion at least in part on its view that court exhibits may be retained indefinitely by the court, and that when they are returned to their owners, it is only "because it is impractical to retain the exhibits in the courthouse" (Pet. App. 13a).

because (1) retrials were "only a possibility"; (2) the court of appeals thought it questionable whether listening to the tapes prior to a retrial would make potential jurors less capable of rendering a fair verdict; and (3) the criminal defendants had not objected, in the district court, to the respondents' applications (Pet. App. 17a-20a). On the last point, the court noted that defendant Haldeman had filed a brief statement in the court of appeals opposing distribution of the tapes on the ground that the resulting publicity would jeopardize his rights upon any retrial (App. 99), but the court found that Mr. Haldeman's statement "hardly warrants careful attention" (Pet. App. 20a n.47). The court also acknowledged that the Special Prosecutor had filed a memorandum on appeal (App. 100-101) stating that he was "unable to conclude with certainty that large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial."[4] In light of the fact that the Special Prosecutor had not formally opposed the applications, however, the court concluded that his statement "does not disturb our basic conclusion."[5]

[4]The Special Prosecutor's statement on appeal was even more equivocal than his statement in the district court, where he had said that he did not foresee "that the rights of the defendants or of the United States to a fair trial would be jeopardized if the [application] is granted" (App. 28-29).

[5]The court also noted that by the time of its decision, the appeals of the Watergate defendants had been decided by the court of appeals, three of the convictions being affirmed and one reversed. The fact that one of the convictions was reversed apparently made a retrial more than "only a possibility." That, however, did not alter the court's conclusion that Judge Sirica's concern about possible prejudicial pretrial publicity did not justify his temporary postponement of any release of the taped conversations (Pet. App. 17a-18a n.41).

The court of appeals then turned to the question whether "concern for the privacy of the persons whose conversations were taped" or "deference owed to presidential records" could justify the district court's decision (Pet. App. 20a-21a). The court observed that while Judge Sirica had referred to these issues, he had not directly based his decision on them. In the court's view, Judge Sirica did not rely on the petitioner's arguments on these points "presumably because Judge Gesell earlier had ruled that they did *not* justify denying access to the tapes (Pet. App. 21a). Since the court of appeals viewed Judge Gesell's decision as "the law of the case," it concluded that the only issue before Judge Sirica was the timing of the release of the tapes, and the only remaining question on appeal was "whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect and copy the tapes."[6] (Pet. App. 21a).

On the issues it deemed Judge Gesell to have resolved, the court of appeals held that he had not abused his discretion. The court first rejected Mr. Nixon's claim that he should not be subjected to the mass merchandising and sale of his words spoken in confidence. The court stated that "neither courts nor legislatures have felt this interest worthy of protection," and further observed that

[6] In characterizing the "narrow issue" presented on appeal, the court of appeals misconstrued Judge Sirica's ruling. In his April 4, 1975 opinion, Judge Sirica addressed only the narrow issue of the propriety of immediate release of the tapes, but he plainly did not regard as settled the question whether the tapes must ultimately be released. The opinion referred to the release, "*if ever*," of the recordings, and postponed consideration of the "*possible*" release of the tapes until the appeals in the Watergate case were decided. Judge Sirica thus had no reason to decide what he plainly regarded as serious issues still remaining to be resolved in the case.

the tapes do not contain "bedroom or other intimate conversations," but rather discussions "between business associates" (Pet. App. 22a).

As to the admonition of this Court, referred to by Judge Sirica, that the district court must "accord to presidential records that high degree of deference suggested in *United States v. Burr*," the court of appeals held that such deference was required only in safeguarding the confidentiality of the records, not in their treatment after they are once disclosed in some form. The contention that mass distribution and marketing of the tapes would offend the respect owed by the court to the office of the President was, the court believed, merely "a question of taste" offering "a singularly weak basis" on which to reject the applications (Pet. App. 25a). Furthermore, the court added, these considerations have less weight because "it seems likely that as a result of the Presidential Recordings and Materials Preservation Act, the words and sounds at issue here will find a further entry into the public domain" [7] (Pet. App. 23a).

The court thus reversed Judge Sirica's order and remanded for development of a "plan for release" of the recordings embodying the principles outlined earlier by Judge Gesell. On motion of the petitioner, the court stayed its mandate pending a petition for certiorari but remanded the record for the District Court to develop a plan for reproduction and distribution of the tapes.[8]

[7] The constitutionality of this Act, and thus the validity of the court of appeals' reasoning in this regard, is presently before this Court in *Nixon v. Administrator of General Services*, No. 75-1605 (argued April 20, 1977). Even if the Act is upheld, it is far from clear that the Presidential conversations will ever be disseminated to the general public.

[8] On December 22, 1976, Judge Sirica issued a Memorandum and Order setting forth a tentative "procedure for developing the plan" for copying and distributing the tapes.

In dissent, Judge MacKinnon noted that "[a]ccess to exhibits in a criminal trial is somewhat different from access to the transcript of oral testimony," for "[P]hysical exhibits, such as the tapes, are the personal property of the owner, and the usual practice is to return them when the case is finished" (Pet. App. 26a). He would have affirmed the district court's determination to withhold any action until all appellate remedies and necessary retrials were concluded, for "[a] significant *reduction* in the possibility of prejudice to a fair trial should not cause a court concerned with constitutional rights to ignore the possibility of prejudice that remains" (Pet. App. 27a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals in this case held that recordings of confidential conversations of a President, produced under subpoena for use as evidence at a criminal trial, must be made available to private parties to be broadcast on television and radio, to be marketed in the form of phonograph records and tape cassettes, and to be exploited in any other fashion that the recipients may devise. To reach this surprising conclusion, the court relied on an extraordinarily broad construction of the public's right to inspect court records. That general common-law right, however, cannot be stretched so far. On the contrary, we submit that a federal court has no authority—under the common law, the Constitution, or otherwise—to provide copies of subpoenaed materials to the public on demand, and that such action is particularly inappropriate when the subpoenaed materials are confidential presidential conversations.

In Part I of the brief, we show that the common law right to inspect court records does not in any way

authorize the court to provide the public with reproductions of items that are in the court's temporary custody pursuant to subpoena. Indeed, despite the heavy emphasis on the point by the court of appeals, the right to inspect court records is not directly involved in this case. The press and public were permitted to hear, report, and read transcripts of the conversations played in open court, and the court records in the Watergate conspiracy case were open for inspection on the same basis as in any other case. What the respondents seek is not simply the right to inspect court records, but the right to copy the recordings of presidential conversations and to exploit them for commercial purposes. Unlike docket sheets, pleadings and transcripts, all of which belong to the court, exhibits composed of subpoenaed materials are not the property of the court at all, but are in the court's temporary custody, solely for use as evidence. The public thus does not enjoy the same rights to copy and otherwise use such privately owned materials as it does in the case of true "court records," which are public property.

For a court to produce and distribute copies of subpoenaed presidential conversations would invade both the property and privacy interests of the participants in the conversations. The court cannot properly permit the appropriation of the taped conversations by private parties any more than it could permit a motion picture company to appropriate a valuable film clip simply because the film was used in a court proceeding. Moreover, court production and distribution of the subpoenaed tapes would subject private conversations to mass merchandising and commercial exploitation, a significantly more offensive intrusion on the participants' privacy interests than playing the conversations in court or publishing printed transcripts of them.

In Part II of the brief, we argue that the Constitution provides no more basis for producing copies of the subpoenaed conversations than does the common-law right of inspection. In the court below, the respondents claimed the right, under the First and Sixth Amendments, to obtain copies of the taped materials that were played to the jury. As this Court's cases make clear, however, the First Amendment provides no special right of access to such materials, much less any right to have a court produce and distribute them to the press and the general public. The Sixth Amendment affords the respondents no more support than the First, for the guarantee of a public trial to the accused can in no way be read to impose a duty on the court to disseminate copies of materials used as exhibits in a criminal trial.

In Part III, we argue that even if discretion exists as to public distribution of subpoenaed materials, that discretion does not permit dissemination of tape recordings of confidential presidential conversations, which this Court has ruled are entitled to "great deference" in their treatment by the courts. In balancing the claim of presidential privilege against the "demonstrated, specific need for evidence in a pending criminal trial," this Court recognized a narrow exception to the privilege, grounded in the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States v. Nixon, supra,* 418 U.S. at 713. That narrow exception did not contemplate the subsequent release of those sensitive presidential materials to be played on records and tapes commercially distributed to the American public. To make the prospect of such commercial treatment of subpoenaed presidential materials a necessary consequence of the use of those materials as evidence in a criminal trial would distort the balance carefully struck by this Court in *United States v. Nixon.*

Finally, in the last part of the brief, we argue that th court of appeals was flatly in error in reversing th decisions of both district judges not to release the tape conversations. While the court of appeals purported t affirm Judge Gesell, it in effect overruled his decisio that the conversations should not be disseminated to th public as long as they were subject to overcommercializ tion and undignified use. Moreover, the court held th Judge Sirica had abused his discretion in declining provide the respondents with copies of the conversatio on demand. The court of appeals was wrong on both counts. Applying the court's own analysis of the trial court's discretion to release or withhold exhibit materials, Judge Gesell's decision to withhold release because of the risk of overly commercial and undignified use of the materials was perfectly appropriate. And Judge Sirica determined not to release the conversations only after carefully weighing the competing factors, including the possibility of unfairness to the defendants in the Watergate conspiracy case. Even if the decision to disseminate copies of subpoenaed materials to the public is subject to the discretion of the trial court, Judge Sirica cannot fairly be accused of having abused that discretion. Instead, the court of appeals simply substituted its judgment for his, and on less well-considered grounds.

ARGUMENT

I.

THE COMMON LAW RIGHT TO INSPECT COURT RECORDS DOES NOT AUTHORIZE A COURT TO DISSEMINATE COPIES OF SUBPOENAED MATERIALS TO THE PUBLIC ON DEMAND

The court of appeals treated this case as if it involved an unexceptional application of the common-law right to inspect public records. Starting from the well-settled

proposition that the public is generally entitled to inspect court records, the court of appeals concluded that this right of inspection requires a district court to provide the public with copies of all exhibits offered in evidence in a criminal case, even if the exhibit materials were obtained from third parties under force of subpoena. Although the court suggested that court records may sometimes be sealed if "justice so requires," it added that there was a "serious question" whether refusing to produce exhibits that were displayed in open court is ever justifiable. (Pet. App. at 15a).

In affording such broad scope to the right of inspection, the court of appeals went far beyond the language or rationale of any of the authorities on which it relied. In fact, under the guise of merely applying a well-settled rule of access, the court created a surprising new doctrine under which persons responding to judicial subpoenas stand to suffer permanent and substantial injury to their interests in any subpoenaed materials.

In essence, the court of appeals employed the following analysis in ruling for the respondents: (1) the common-law right of inspection applies to all court records, including exhibits; (2) the petitioner retained no interest in the taped conversations after they were played in open court, and therefore had no grounds for objecting to their dissemination to the public; (3) tape recordings are subject to the common-law right of inspection and copying on the same basis as are documentary materials; and, therefore, the respondents have a clear right to obtain copies of the subpoenaed conversations. As we shall show, the court was wrong on all three points. First, subpoenaed materials used as exhibits do not belong to the court, and are not "court records" subject to inspection and copying in the same fashion as docket sheets, pleadings and transcripts. Second, a person producing materials

under force of subpoena retains his prior interests in the materials; the court has only temporary custody of them for the limited purpose of using them as evidence. Third, the courts have drawn a clear distinction between tape recordings and documentary materials with respect to rights of inspection and access, and they have not permitted copying of tape recordings of court proceedings even when those recordings are clearly "court records." Accordingly, not only is a court not required to provide copies of subpoenaed materials to the public, it has no authority to do so, even as a matter of discretion.

A. Subpoenaed Exhibit Materials are Not "Court Records," And Are Therefore Not Subject to the Common-Law Right of Inspection.

In a number of jurisdictions, the right of access to judicial records is governed by statute or court rule. See, *e.g., In re Mosher,* 45 C.C.P.A. 701, 248 F.2d 956 (1957); *Ex Parte Drawbaugh,* 2 App. D.C. 404 (1894); *State ex rel. Beckley Newspapers v. Van Hunter,* 127 W. Va. 738, 34 S.E.2d 468 (1945). In the absence of a controlling statute or rule, courts have held that court records should ordinarily be open to public inspection, subject to the trial judge's discretion to seal the record in particular cases. See, *e.g., Garfield v. Palmieri,* 193 F.Supp. 137, 143 (S.D.N.Y. 1961); *Sanford v. Boston Herald Traveler Corp.,* 318 Mass. 156, 61 N.E.2d 5 (1945); *State ex rel. Williston Herald, Inc. v. O'Connell,* 151 N.W.2d 758 (N.D. 1967). The rationale underlying this policy is that records belonging to the court are public property and that any general rule maintaining the secrecy of those records would be inconsistent with the principles favoring open and public court proceedings. See *Ex Parte Drawbaugh, supra,* 2 App. D.C. at 407-08; *cf. Nowack v. Auditor General,* 243 Mich. 200, 219 N.W.

749 (1928) (same policy applied to non-judicial records). This "public property" rationale supports the right to inspect court records such as docket sheets, pleadings and transcripts, since those documents are within "the common understanding of what belongs to a public court of record." *Ex Parte Drawbaugh, supra,* 2 App. D.C. at 407-08. It does not, however, require the court to produce and disseminate subpoenaed materials, which do not belong to the court at all, but are only in the court's temporary custody by virtue of compulsory process upon an individual or organization.

The court of appeals overlooked this important difference between papers belonging to the court and materials subpoenaed from third parties. Instead, it lumped the two groups together under the rubric of "court records" and held that the right of inspection applies in the same fashion to both.[9] This error was based on a serious misconception of the nature of a court's interest in subpoenaed materials. The court of appeals

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[9]To buttress its characterization of subpoenaed exhibit materials as "court records" and therefore as being within the reach of the general right of inspection, the court of appeals relied on Rule 10(a) of the Federal Rules of Appellate Procedure and the Manual for Clerks of the United States District Courts. Neither of these authorities supports even this semantic point.

Rule 10(a) refers to exhibits filed in the district court as being part of the "record on appeal." The inclusion of exhibits within the term of art "record on appeal" obviously does not make a particular exhibit a "court record"; many "court records" are not part of the "record on appeal," and vice versa. See *England v. Gebhardt,* 112 U.S. 502, 506 (1884). And the suggestion in the Clerk's Manual that documentary exhibits in historical cases be retained by the court was not intended to give the clerk a right to retain subpoenaed materials where their return is requested, but rather to guide the clerk where the choice is between retaining and destroying the materials. See Rules of the United States District Court for the District of Columbia, Rule 2-10(d).

apparently concluded that after materials are delivered to a district court in response to a subpoena, they become the property of that court, like any pleading filed by the parties. The court suggested, for example, that subpoenaed materials used as exhibits are customarily returned to their owners, not as a matter of right but as a matter of grace or convenience, and that if the court sees fit, it can choose to retain the subpoenaed materials permanently (Pet. App. 13a). This view is squarely contrary to well-settled principles of law and the consistent practice of the courts. Indeed, the proposition that subpoenaed materials belong to the court would come as a great surprise, for example, to a bank officer served with a subpoena *duces tecum* for previously stolen bank funds or to the owner of a valuable watch on which a thief's fingerprints were found.

The courts that have addressed the question have uniformly held that subpoenaed materials are in the court's temporary custody for use as evidence only, and that at the conclusion of the proceeding for which they were subpoenaed, they must be returned. Subpoenaed documents, as one court has written, "do not thereby become the property of the government or of the court." *Robert Hawthorne, Inc. v. Director of Internal Revenue,* 406 F.Supp. 1098, 1131-32 (E.D. Pa. 1976). See also *Hale v. Henkel,* 201 U.S. 43, 80 (1906) (McKenna, J., concurring); *In re Kelly,* 19 F.R.D. 269 (S.D.N.Y. 1956) (Weinfeld, J.); *Application of Bendix Aviation Corp.,* 58 F.Supp. 953 (S.D.N.Y. 1945).[10] Instead, the clerk of a

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[10]This rule is subject to a limited exception in the case of materials subpoenaed for a grand jury investigation. When the government indicates that it intends to use the materials at trial, courts have occasionally declined to require the government attorneys to return the materials, which they would then

[footnote continued]

district court is "a mere custodian" of subpoenaed property, having custody only "as an incident of the trial before the District." *United States v. Monjar,* 154 F.2d 954, 957 (3rd Cir. 1946).

The interests retained in subpoenaed property, of course, extend beyond the simple right to its ultimate return. The subpoena *duces tecum* works the most limited possible invasion of the private rights in the subpoenaed materials, consistent with the compelled production of evidence.[11] Accordingly, as a "mere custodian," the court clerk does not have the right—much less the duty—to retain or dispose of subpoenaed property in a manner inconsistent with the private interests retained in that property.[12]

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immediately resubpoena under F.R. Crim. P. 17(c) or F.R. Civ. P. 45. *United States v. Gilboy,* 160 F. Supp. 442, 463 (M.D. Pa. 1958); *United States v. Maryland & Virginia Milk Producers Ass'n,* 151 F. Supp. 438, 440 (D.D.C.), *aff'd as modified,* 250 F.2d 425 (D.C. Cir. 1957). These cases, however, do not in any way suggest that the materials are the property of the government or the court; they turn instead on the principle that the court will not enter a pointless order.

[11]Unlike a search warrant, a subpoena *duces tecum* does not even disturb the right of possession of property; it merely alters the temporary right of custody. *In re Kelly, supra; Okland County v. Bice,* 386 Mich. 143, 191 N.W.2d 338 (1971); *In re Atlas Lathing Corp.,* 176 Misc. 959, 29 N.Y.S. 458 (Sup. Ct. 1941). As several courts have noted, the subject of a subpoena could technically comply with its demands by attending with the records during the hours of court and keeping the records with him at all other times. *United States v. Birrell,* 242 F. Supp. 191, 204 (S.D.N.Y. 1965); *Application of Bendix Aviation Corp., supra; In re American Sugar Refining Co.,* 178 F. 109 (C.C.S.D.N.Y. 1910); *In re Randall,* 87 App. Div. 245, 84 N.Y.S. 294 (1903).

[12]The courts have regularly respected the private rights retained in subpoenaed materials while those materials are in the custody of the court clerk or other government officers. See, *e.g.,*

[footnote continued]

Thus, while the right of inspection requires that the court ordinarily permit inspection and copying of court-owned materials, it does not require the court to give the same treatment to subpoenaed materials, and it certainly does not authorize the clerk to produce copies of those materials for public distribution over the opposition of the person from whom they were subpoenaed. Indeed, this Court suggested the limited use to which these very materials could be put when it remarked in *United States v. Nixon, supra,* 418 U.S. at 712 n.19, that production of the conversations was required only for the purpose of vindicating "the constitutional need for relevant evidence in criminal trials."

B. The Petitioner Retains Both Property and Privacy Interests in the Subpoenaed Materials

As we shall show, Mr. Nixon has continuing property and privacy interests in the recorded sound of the taped conversations. By extending the common-law right of inspection to require the dissemination of copies of those conversations, the holding of the court of appeals improperly disregards those interests and permits the respondents to appropriate the conversations and dispose of them as they choose. Nothing in the common-law right of inspection or in the practice of the federal courts permits such an extraordinary invasion of private rights.

Granberry v. District Court, 531 P.2d 390, 394 (Colo, 1975); *State v. Smithmeyer,* 110 Kan. 172, 175-76, 202 P. 638, 639-40 (1921); *In re Atlas Lathing Corp.,* 176 Misc. 458, 29 N.Y.S. 959 (Sup.Ct. 1941); *Carter v. Graves,* 12 N.C. 54, 55 (1826); *cf. In re Investigation,* 27 F. Supp. 997, 998 (S.D.N.Y. 1939).

1. The petitioner has a property interest in the taped conversations.

The courts have recognized that an individual has a property interest in the sound of his own voice. See *King v. Mister Maestro, Inc.*, 224 F.Supp. 101 (S.D.N.Y. 1963); *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*, 42 Misc. 2d 723, 248 N.Y.S.2d 809 (Sup. Ct. 1964). In some settings, that interest has been regarded as a function of the creative effort of the performer, while in others it has been linked with the right to the exclusive use of the speaker's own name and reputation. See *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950). In either case, the fact that an expression is oral in no way deprives it of its status as property.

The property interest in a recorded conversation is perhaps most closely analogous to the property interest that has long been recognized in a person's private letters. Even when such letters are not literary creations—by intention or in fact—the courts have held that the writer enjoys a property right in those letters that must be respected by a court of equity. As early as 1841, Mr. Justice Story, sitting on circuit, resolved this question in the well-known case of *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841), which involved claims to various papers, including personal letters of President George Washington. Addressing the status of the President's personal letters, Mr. Justice Story wrote (9 F. Cas. at 346):

> In the first place, I hold, that the author of any letter or letters, (and his representatives,) whether they are literary compositions or familiar letters of business, possesses the sole and exclusive copyright therein. . . . [T]hird persons, standing in no privity with either [sender or receiver] are not entitled to

> publish them, to subserve their own private purposes of interest, or curiosity, or passion.

This common-law property right in one's personal letters—even informal ones never intended for publication—has been consistently recognized since the *Folsom* decision.[13] See, *e.g.*, *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936); *Johnson v. Johnson*, 34 Ill. App. 3d 356, 340 N.E.2d 68, 78 (1975); *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912); M. Nimmer, Copyright §64 (1971).

In *King v. King*, 25 Wyo. 275, 168 P. 730 (1917), perhaps the closest reported case on its facts to this one, the defendant had sought to obtain copies of the plaintiff's letters, which were attached to a deposition on file with the court. As in this case, the defendant claimed a right to copy the letters and publish them because the letters, "being in the custody of the clerk by order of the court are in *custodia legis* and part of the public records to which all persons should have access at all proper times." 168 P. at 284. The court rejected this argument on several grounds, among them that the letters were not court records, and that the plaintiff had lost none of his property rights in the letters merely because they had been placed in the temporary custody of the court clerk. The court concluded (168 P. at 285):

> The letters being property after they had served their purpose as evidence stood in the same position

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[13] By referring to the sole and exclusive "copyright" Justice Story was, of course, referring to the common law property right in unpublished materials, not the statutory right stemming from the Copyright Act of 1909. Moreover, the difficult problem of separating the rights of the sender and the recipient of a letter is not present here, since the proposed publication in this case is by third parties who were not privy to the conversations.

as other personal property, which might be used in evidence, such as a watch which has been the subject of larceny, which should be returned to the owner.

The same principles apply to this case. The fact that Mr. Nixon's confidential communications with his associates have been recorded on a magnetic tape rather than in letter or memorandum form makes no difference to their status as property. And, as in the case of private letters, the choice of whether to release the recorded conversations belongs to Mr. Nixon, not to the respondents or the court.[14]

2. The petitioner has a privacy interest in the conversations that survives their being played in open court.

In addition to a property interest, the petitioner retains a privacy interest in the taped conversations, which would be infringed if aural copies of the conversations were publicly distributed. The court of appeals held that the petitioner enjoyed no privacy interest in the conversations, either before or after they

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[14]Of course, if a speaker dedicates his words to the public, he effects a "general publication" which deprives him of any further proprietary claims to the content or form of those words. See *Public Affairs Associates, Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111 (1962); *Current Audio, Inc. v. RCA Corp.*, 71 Misc. 2d 831, 337 N.Y.S.2d 949 (S. Ct. 1972). Similarly, if the speaker understands that other participants in the conversation intend to record the speaker's words for publication, he may be deemed to have retained no property rights in that conversation. *Cf. Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2s 250 (1968). In this case, however, Mr. Nixon did not voluntarily make the conversations public, and it is not the participants, but independent third parties who seek to appropriate the aural record of the conversations.

were played to the jury. We submit that the court was wrong on both points.

Mr. Nixon plainly had a protectable privacy interest in the tapes prior to their use in the criminal trial. This Court said as much in *United States v. Nixon, supra*, 418 U.S. at 708, when it wrote: "The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens." The court of appeals suggested that Mr. Nixon had no claim to privacy in the taped conversations because they were "not recordings of bedroom or other intimate conversations," but rather "conversations between business associates." (Pet. App. 22a.) This distinction, however, will not withstand analysis. There is no support, in the decisions of this Court or any other, for limiting the right of privacy to "bedroom or other intimate conversations." Indeed, if the court of appeals is correct that "conversations between business associates" are not protected by any privacy considerations, then the leading case of *Katz v. United States*, 389 U.S. 347 (1967), was wrongly decided, for that case involved a private business conversation, which the Court held was entitled to protection under the Fourth Amendment. See also *Silverman v. United States*, 365 U.S. 505 (1961).

As to the petitioner's present privacy claim, the court of appeals stated that any initial privacy interest in the conversations evaporated when the tapes were played in open court. This view interprets the petitioner's privacy claim as being limited to an asserted right of absolute confidentiality. But the variety of privacy interests recognized by the law include much more than just confidentiality. An individual has a privacy interest, for example, in preventing "appropriation of some element

of [his] personality for commercial exploitation," *Price v. Hal Roach Studios, Inc.*, 400 F.Supp. 836, 843 (S.D.N.Y. 1975), and in avoiding the "unwanted and unwarrented publication of his likeness or activity." *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 496 (3d Cir. 1955) (Hastie, J., dissenting), *cert. denied*, 351 U.S. 926 (1956).

The fact that the contents of the conversations are no longer secret does not mean that exploitation of the recorded sound of the conversations is inoffensive and perfectly permissible. If, for example, a tape recording of a personal conversation between a man and his wife were made an exhibit at a criminal trial, we submit that the fact that it was played in open court and even reported in the newspapers would not deprive the couple of any privacy interest that they might assert if a record company sought to obtain the tape from the court for commercial distribution.[15]

A case that has recently been before this Court provides a graphic example of a privacy interest that has been recognized in spite of revealing prior publicity. In that case, *Roe v. Doe*, 33 N.Y.2d 902, 307 N.E.2d 823 (1973), *aff'g* 42 App. Div. 2d 559, 345 N.Y.S.2d 560,

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[15]Another difficulty with the respondents' answer to the privacy claim is that it contradicts their First Amendment argument. On the one hand, the respondents contend that the taped conversations have received such thorough press coverage already that further publicity would work no additional invasion of the petitioner's privacy. On the other hand, they insist that the coverage already given to the conversations is inadequate, and that the conversations must be disseminated in aural form before the public will appreciate their significance. Yet if the published transcripts provide much less satisfactory exposure to the conversations than an aural version, the petitioner plainly has an interest in preventing the conversations from being disseminated in this "revealing" new medium.

cert. dismissed as improvidently granted, 420 U.S. 307 (1975), a New York state court granted an injunction against further distribution of a book containing a psychiatrist's case study of one of his patients. The court found that the patient's right to privacy was violated because personal details of her life and treatment were openly discussed in the book, and her identity was not sufficiently disguised. Even though the patient's name had appeared in press reports about the book, and even though a number of copies of the book had already been distributed at the time the injunction was sought and entered, it was never seriously contended that the patient's continuing privacy interests had somehow been vitiated by the prior publicity.[16]

Finally, the court of appeals mistakenly measured the petitioner's privacy claim against the proof requirements of the common-law tort of invasion of privacy. In so doing, the court gave an unduly narrow construction to the petitioner's claim. Because of the potentially disruptive effects of damage awards in this relatively unchartered area, the courts have been wary of extending tort liability for invasion of privacy beyond the most clear-cut and outrageous cases. See *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 491 (1974). But the restricted sphere of tort liability does not define the limits of an individual's privacy interests for all purposes.[17]

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[16]Significantly, in spite of the prior publicity, this Court granted a motion to seal the record in the *Roe* case while it was pending on certiorari. 419 U.S. 819 (1974).

[17]The area of libel provides an apt analogy. Although tort law does not provide damages to a public figure for defamatory statements in the absence of "actual malice," that does not mean that the public figure does not retain an interest in not having such statements made about him. It merely means that the courts deem it too costly to other social values to permit him to vindicate that interest by collecting damages against the offender. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-42 (1974).

In this case, if the tapes are released, the actual sounds of the petitioner's confidential conversations will be available in permanent form to be played at cocktail parties, to be used in comedy acts or dramatic productions, and otherwise to be exploited for every purpose and in every manner that may occur to the enterprising, the imaginative, or the antagonistic recipients of copies. While the use of the recordings at trial certainly was contrary to the petitioner's expectations at the time he engaged in the conversations, that use was justified by what this Court termed "the fundamental demands of due process of law in the fair administration of criminal justice." The subsequent dissemination of aural copies of those conversations to the general public, however, is even more inconsistent with the petitioner's reasonable expectations of privacy in the conversations, yet not justified by any countervailing factor such as the need for the materials as evidence in a criminal trial. Accordingly, even if the respondents' use of the conversations in broadcasts and on records would not constitute a compensable tort, the court cannot ignore the petitioner's continuing privacy interest in the subpoenaed materials in determining whether it should release them to the public.

This view of the privacy interest is consistent with that adopted by the drafters of the Code of Judicial Conduct. In Canon 3A(7), the Code provides that a judge should prohibit recording of judicial proceedings except under narrowly defined circumstances. One of the prerequisites for recording is that each witness give his consent to having his testimony recorded. Canon 3A(7)(c)(ii). In his notes to that section, the reporter explains that the committee "was of the opinion that each witness should be entitled to decide if he wants to be involved in a project that entails inroads on his privacy beyond that

inherent in being a witness in court." Thode, Reporters Notes to Code of Judicial Conduct 58-59 (1973). In referring to the "privacy" of witnesses, the reporter did not, of course, mean to imply that a witness whose testimony was recorded without permission would be entitled to bring a tort action for invasion of privacy against court officers or other persons who distributed copies of the recording. Nonetheless, the committee recognized that recording of testimony "entails inroads on privacy," and that the witness' interest in privacy survives his testimony in open court. Mr. Nixon, whose recorded conversations were introduced into evidence, has a similar privacy interest in the contents of the recorded conversations. This Court should not sanction further inroads on that interest beyond those inherent in the use of the recordings at trial.

C. Courts Do Not Permit Copying of Tape Recordings, Even When They Are Plainly Court Records

1. The Courts Properly Distinguish Between Documentary and Recorded Materials.

The fact that an exhibit is not an official court record and that the clerk's function is merely custodial does not mean that the clerk is thereby prohibited from ever making copies of exhibits available to members of the public. Indeed, it may well be that district court clerks in some jurisdictions ordinarily provide such copies absent opposition or contrary instructions from the court. Even this practice, however, apparently does not extend to recorded or filmed exhibits, for neither the court of appeals nor the respondents could cite any instance in which copies of non-documentary exhibits

were provided to the public over the opposition of the owner or a party to the proceeding.[18]

Contrary to the suggestion of the court of appeals, the courts have drawn a sharp distinction between documentary materials and tape recordings. In this Court, for example, oral arguments are open to the public, and transcripts of oral arguments are made publicly available, but the tape recordings of the arguments are not released until three years after the date of the argument, and then only upon application by a person who agrees to limit the use of the recordings to scholarly or legal research.[19] No one obtaining recordings of arguments may duplicate or otherwise disseminate them.

More generally, it is hard to square the court of appeals' construction of the common-law rule with the almost universal prohibition against recording judicial proceedings for commercial use.[20] Some 39 district courts have local rules prohibiting aural recording of judicial proceedings, and no federal courts, so far as we

[18]The fact that the district court judges consulted by Judge Hart found the question of the release of the tapes a difficult one that should be left to the trial judge (App. 10-11) suggests that the practice of releasing such exhibits is not so common or uniform as the respondents contend. And at least one district court has a local rule specifically prohibiting the release of recorded deposition testimony for broadcasting purposes. C.D. Cal. Rule 29(h).

[19]This restriction on the use of recordings of court proceedings is similar to that in the Code of Judicial Conduct. Canon 3A(7)(c)(iv) provides that recordings of judicial proceedings can only be exhibited "for instructional purposes in educational institutions," a restriction intended to avoid undignified commercial exploitation of such sensitive recordings.

[20]As the district judges consulted by Judge Hart agreed, it is difficult to distinguish between playing tapes that contain exactly what was played in open court, and actually broadcasting portions of the proceedings.

are aware, expressly permit it.[21] Indeed, in the case of *Amsler v. United States*, 381 F.2d 37, 53 (9th Cir. 1967), the court held that the defendant was not entitled to make a recording of the trial proceedings even for his own use, at least where the proceedings were being reported by an official court reporter and daily transcript was being provided to the defendant.[22] Where the tape recordings have been prepared for later broadcast or distribution, courts have strongly condemned the practice, even when it has not deprived the defendant of a fair trial. See, *e.g.*, *Hudson v. State*, 108 Ga. App. 192, 132 S.E.2d 508 (1963); *Bisignano v. Municipal Court*, 237 Iowa 895, 23 N.W.2d 523 (1946), *cert. denied*, 330 U.S. 818 (1946); *State v. Cox*, 188 Kan. 500, 363 P.2d 528 (1961). These decisions are not based solely on the need to avoid prejudicial publicity in criminal cases, but on the further consideration that commercial dissemination of aural recordings of a trial or an appellate argument would be undignified and would detract from the solemnity

[21]See D. Ariz. Rule 5(a); E.D. Ark. Rule 21(a); W.D. Ark. Rule 21(a); C.D. Cal. Rule 29(a); E.D. Cal. Rule 4(a); N.D. Cal. Rule 5(a); S.D. Cal. Rule 29(a); D. Colo. Rule 16; D.D.C. Rule 1-27(b); S.D. Fla. Rule 20; M.D. Fla. Rule 13(B); N.D. Ga. Rule 21.2; E.D. Ill. Rule 33; S.D. Ind. Rule 30; W.D. Ky. Rule 31; E.D. La. Rule 13.11(c); D. Md. Rule 15; D. Mass. Rule 29(a); E.D. Mich. Rule 26(a); D. Minn. Rule 7(d); W.D. Mo. Rule 25A; D. Neb. Rule 39D; D. Nev. Rule 12(b); D.N.H. Rule 26(a); D.N.J. Rule 36(e); D.N.M. Rule 19; E.D.N.C. Rule 11; W.D.N.C. Rule 5; D.N.D. Rule 3D; N.D. Ohio Rule 10; N.D. Okla. Rule 29(j); D. Ore. Rule 6(a); M.D. Pa. Rule 101.16; W.D. Pa. Resolution May 21, 1968; D.R.I. Rule 42(a); D.S.D. Rule 21(d); S.D. Tex. Rule 17; N.D. W.Va. Rule 1.16; E.D. Wis. Rule 15.

[22]In cases in which official transcripts have not been available, courts have occasionally permitted defendants to make tape recordings of the proceedings, but only for their personal use in a possible retrial or appeal. See *Davey v. Atlanta*, 130 Ga. App. 687, 204 S.E.2d 322 (1974); *People v. Jaspar*, 393 Mich. 149, 224 N.W.2d 22 (1974).

appropriate to judicial proceedings.[23] In practice, then, the courts have not extended the common-law right of access and inspection to permit public recording of court proceedings and copying of recordings in the court's custody. Instead, those courts that have addressed the issue have distinguished between recordings and documentary materials and have placed much tighter restrictions on the use and distribution of recordings.

2. The Right to Inspect Recorded Materials Does Not Incorporate the Right to Obtain Copies of Those Materials.

Relying on cases involving documentary materials, the court of appeals concluded that the right of inspection necessarily incorporates the right to obtain copies of the inspected materials. We submit that, at least as applied to recorded materials, the court's conclusion does not reflect either actual practice or sound policy.

Perhaps the best illustration of the error in the court's reasoning is the practice followed with respect to the tape recordings that are often made by a court reporter to supplement his stenographic notes of trial proceedings. Under 28 U.S.C. §753(b), the reporter is authorized to make such recordings, and the public is authorized to inspect them.[24] This, of course, is not surprising, since

[23]As we noted above, the reporter for the Code of Judicial Conduct has advanced an additional reason for the reluctance to permit judicial proceedings to be recorded: protection of the privacy interests of parties and witnesses. Thode, Reporter's Notes to Code of Judicial Conduct 58-59 (1973).

[24]The statute provides that court reporters "shall record [the proceeding] verbatim by shorthand or by mechanical means which

[footnote continued]

the reporter's tape recording, like his stenographic notes, is plainly a "court record," and since the need for correct reporting is best served by permitting examination of the recording if there is doubt as to the accuracy of the stenographic notes.

It is equally plain that this right of inspection does not include the right to copy that particular "court record" and to disseminate copies of the tape recording for commercial purposes.[25] If it were otherwise, the respondents could obtain a copy not just of the taped conversations but of the whole Watergate conspiracy trial, simply by demanding the right to inspect and copy the reporter's tape recording of the entire proceeding. The fact that the respondents have not even ventured to request such relief demonstrates that they well appreciate the difference between requesting a copy of the transcript of a particular proceeding and a copy of the tape recording of that proceeding.

The same principle applies to exhibit materials. For example, the district courts in criminal cases routinely receive in evidence tape recordings derived from court-approved wiretaps. Though authorized by law, these recordings undoubtedly constitute invasions of the privacy of those whose voices are recorded. So far as we are aware, however, no suggestion has yet been made that

may be augmented by electronic sound recording." It further provides that the "original notes or other original records . . . shall be open during office hours to inspection by any person without charge."

[25]The local rules of a number of district courts expressly prohibit such use of the reporter's tape recordings of judicial proceedings. See, *e.g.*, C.D. Cal. Rule 29(b); E.D. Cal. Rule 4(b); S.D. Cal. Rule 29(b); D. Md. Rule 15; D. Mass. Rule 29(b); E.D. Mich. Rule 26(7); D.N.H. Rule 26(b); N.D. Ohio, Rule 10; D.R.I. Rule 42(b).

because the wiretapped conversations are made public as an unavoidable incident of a criminal trial, copies must be made available for broadcast and sale. Yet the principle advanced by the respondents in this case would certainly require such relief upon their demand, and in view of the often widely-publicized nature of cases utilizing wiretap evidence, such demands are inevitable. Similarly, no one has yet suggested, so far as we are aware, that films—obscene or otherwise—played in open court during a criminal trial must be copied and made available to the public, yet according to the principle urged by the respondents, there exists a legal right to such relief.

The court of appeals purported to deal with these examples by suggesting that courts can seal their records when "justice so requires," although it took back most of what it appeared to have conceded when it stated that it had serious doubts whether exhibits played in open court should *ever* be exempt from public copying (Pet. App. 16a). For the reasons previously discussed, we submit that a court has *no* authority to disseminate to the public copies of recordings that come into its temporary custody as exhibits. But even if some such authority exists, the principle that dissemination must occur unless "justice requires" otherwise in particular cases is unsatisfactory for several reasons.

First, the court provided no guidance as to what factors are sufficient to trigger the determination that "justice requires" that exhibits be sealed. Certainly if a case involving confidential conversations of a President of the United States is not one calling for discreet handling, it is difficult to imagine a case that would fit the court's bill. Second, the court's suggestion that exhibits played in open court must always be copied and distributed to the public on demand puts a district court in an unnecessarily difficult position. If an exhibit, such as a pornographic

movie or a wiretapped conversation, must be sealed and played only in a closed session of court in order to avoid having to disseminate copies of it to the public, then the court will be awkwardly caught between the public's demand for copies of the film or tape and the defendant's demand for a public trial. Finally, requiring persons who object to the dissemination of recorded materials to meet the heavy burden of showing that those materials should be sealed imposes an unfair and unnecessary hardship on them. In view of the increasingly common practice of tape recording and videotaping depositions, for example, witnesses would be subject to having their voices and images publicly exploited unless they could command the resources necessary to persuade a court that "justice required" that their deposition be sealed.[26] Besides finding no support in practice or case law, the proposal of the court of appeals for handling subpoenaed films and recordings is thus both impractical and unduly burdensome to those who are subjected to the compulsory process of a court.

In sum, the authorities and practices cited by the respondents and relied on by the court of appeals do not at all support the judgment below. Far from presenting any law, precedent, or principle *requiring* the district court to grant them the relief they seek, the respondents have failed to cite any authority even *permitting* a court to grant such relief. Neither the common-law right of

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[26]Rule 30(b)(4) of the Federal Rules of Civil Procedure provides that depositions may be taken "by other than stenographic means," and the practice of recording depositions has been greeted with favor by the courts. See, *e.g.*, *Colonial Times, Inc. v. Gasch*, 509 F.2d 517 (D.C. Cir. 1975); *Marlboro Products Corp. v. North American Philips Corp.*, 55 F.R.D. 487 (S.D.N.Y. 1972). The use of recorded testimony has been approved in criminal cases as well. See *United States v. LaFatch*, 382 F. Supp. 630 (N.D. Ohio 1974).

inspection nor any formal or informal court practice authorized the district court to provide the respondents with copies of the taped conversations. Since the subpoenaed conversations did not become the property of the court, but instead were only in the court's temporary custody for use as evidence, the court of appeals erred in ordering the district court to distribute copies of the conversations to the public over the petitioner's objection and in derogation of his continuing interests in them.

II.

NEITHER THE FIRST NOR THE SIXTH AMENDMENT REQUIRES THE COURT TO DISSEMINATE COPIES OF THE TAPED CONVERSATIONS

In their initial applications, the respondents relied primarily on the First and Sixth Amendments to support their claims. Respondent Warner sought additional comfort, apparently, in the Fifth Amendment.[27] The court of appeals did not reach the constitutional claims, but an examination of the arguments briefed below demonstrates that the constitutional claims are not well founded.

[27]In its brief in the court of appeals, Warner complained that the district court had unlawfully discriminated against the "sound media" in favor of the print media, and that its decision had "denie[d] editorial freedom to the sound media." The "sound media" were not, of course, denied any privilege that was provided to others, and the fact that tape recordings would be more valuable to them in their business than would the transcripts previously provided to all the media does not give rise to a due process or equal protection claim. See *Estes v. Texas*, 381 U.S. 532, 540 (1965).

A. The First Amendment affords no support to the respondents' claim.

In the proceedings below, the respondents characterized Judge Sirica's refusal to provide them with copies of the "Watergate tapes" as a "prior restraint on expression" and argued that his action was therefore suspect under the First Amendment. In support of their argument, the respondents relied heavily on decisions of this Court and others striking down restraints imposed on what the press may report concerning public court proceedings. *E.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975); *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301 (1974) (Powell, J., in chambers); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972). The short answer to this contention is that Judge Sirica's actions simply did not constitute a "prior restraint" under any proper understanding of the term. For this reason, as Judge Gesell held in his opinion of December 5, 1974, the respondents' First Amendment claim is "wholly without merit."

Because the consequences of labeling a particular order as a "prior restraint" are severe,[28] this Court has given the term a carefully circumscribed scope. Prior restraints, the Court has stated, include "orders that prohibit the publication or broadcast of particular information or commentary," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556 (1976), and arbitrary denials of a public forum to those seeking to use it for protected speech,

[28]The Court has never upheld an injunction that it has termed a "prior restraint" on protected expression, despite intimations that some such restraints may be permissible. See *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, *supra*, at 591 (Brennan, J., concurring in the judgment).

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975). Other actions, however, such as criminal prosecutions or civil suits based on the contents of a publication, are not considered prior restraints, even though they may in various ways discourage speech. See *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 559; *id.* at 594 n.20 (Brennan, J., concurring in the judgment); *New York Times Co. v. United States*, 403 U.S. 713, 730 (Stewart, J., concurring); *id.* at 731 (White, J., concurring). Similarly, a policy, statute or order providing that particular information will remain confidential or otherwise out of the public domain is in no sense a "prior restraint," even if the press would choose to publish that information if the Government made it available. See *Pell v. Procunier*, 417 U.S. 817, 829-30 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); *Zemel v. Rusk*, 381 U.S. 1 (1965).

In this case, Judge Sirica did not in any way prohibit the respondents from publishing any information they had or from printing or distributing anything they pleased. The respondents' complaint below was simply that the district court had declined to prepare and provide them with an aural transcription of certain portions of tape recordings in its custody—recordings that the press had already heard and fully reported. The court's action imposed no "restraint" on the respondents unless that term is to be read to include any refusal by a court or other governmental agency to provide members of the press any material or information they may desire.

Alternatively, the respondents argued that Judge Sirica's refusal to provide them with copies of the taped conversations deprived them of their constitutional "right of access" to newsworthy materials. In light of recent decisions of this Court declining to grant the press any special right of access to news sources, and in view of

Judge Sirica's extraordinary accommodations to the press at the trial, the "access" argument is totally without force here.

Judge Sirica permitted reporters to be present when the tapes were played in the courtroom; he provided them with earphones so that they could hear the tapes accurately and conveniently; and he provided them with complete transcripts of the conversations, which they could, and did, reproduce and report widely. To call his refusal to provide copies of the tapes for commercial use a "denial of access" is to stretch that term beyond any useful meaning. What the respondents seek is much more than just *access* to the recorded conversations. They want the court to provide them with reproductions of the material so that they may broadcast and distribute them for sale. Yet the respondents have cited no case whatsoever suggesting that the First Amendment gives them any such right. Indeed, in *Zemel v. Rusk*, 381 U.S. 1 (1965), this Court cautioned against the same kind of broad-based claim of "access" that is asserted here. In that case, the petitioner argued that denying him the right to travel to Cuba impermissibly restricted his First Amendment right of access to information about that country. In response, the Court wrote (381 U.S. at 16-17):

> There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Even if this case presented a true question of "access," the respondents could claim no special First Amendment right to information kept out of the public domain. In several recent cases, this Court has made it clear that the press has no right of access to information greater than that available to the public generally. *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972); see *Houchins v. KQED, Inc.*, 97 S.Ct. 773 (1977) (Rehnquist, J., in chambers); *Trimble v. Johnston*, 173 F.Supp. 651 (D.D.C. 1959); *McLaughlin v. Philadelphia Newspapers, Inc.*, 348 A.2d 376 (Pa. 1975).

The poverty of the respondents' First Amendment argument is perhaps best illustrated by examining the one recent case which they characterized below as "dispositive" of this case and as the "controlling precedent." That case is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which held unconstitutional a Georgia statute making it a misdemeanor to publish the name of a rape victim. The petitioner television station in that case had broadcast the victim's name after obtaining the information from public court records. The Court held the Georgia statute unconstitutional on the ground that it imposed sanctions on pure expression—the content of a publication—rather than on "conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 495. The First and Fourteenth Amendments, the Court wrote, "command nothing less than that the States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." *Id.*

It is difficult to understand how *Cox Broadcasting* could be deemed "dispositive" or "controlling" here. The

Georgia statute did not bar the court from disclosing the rape victim's name. Instead, the restraint imposed by the statute was one on publication of information that the television station already had or could readily obtain from public records. Had *Cox Broadcasting* involved, for example, a refusal by the Georgia trial court to provide for broadcast purposes a copy of a police photograph of the deceased victim, the decision would have had precedential value here. But far from suggesting the proper resolution of such a case, the Court specifically noted that its ruling did not address the question of a refusal of access to official court records, 420 U.S. at 496 n. 26, much less any obligation on the court to provide the press with copies of exhibit materials.[29] Accordingly, the *Cox Broadcasting* case, like the cases involving issues of "prior restraint" and "media access," is plainly not "dispositive" or "controlling" here. Instead, both *Cox Broadcasting* and the other authorities on which the respondents have premised their First Amendment claims demonstrate how far short they fall of finding a First

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[29]The fact that the Court did not intend its ruling in *Cox Broadcasting* to confer on the press any constitutional right to obtain copies of materials before the court is made even clearer by the recent *per curiam* decision in *Oklahoma Publishing Co. v. District Court*, 97 S. Ct. 1045 (1977). That case, like *Cox Broadcasting*, involved the constitutionality of a prohibition against publication of "widely disseminated information, obtained at court proceedings which were in fact open to the public." 97 S. Ct. at 1046. In the course of its opinion, the Court had occasion to note the narrow scope of the *Cox Broadcasting* holding (97 S. Ct. at 1046, citations omitted): "The Court in *Cox Broadcasting* expressly refrained from intimating a view on any constitutional questions arising from a state policy of denying the public or the press access to official records of juvenile proceedings, but made clear that the press may not be prohibited from 'truthfully publishing information released to the public in official court records.' "

Amendment violation in Judge Sirica's refusal to provide them with copies of the taped conversations.[30]

B. The Sixth Amendment right of the defendants to a public trial has been fully satisfied.

The respondents have based their applications on the Sixth Amendment as well as the First. In so doing, however, they have ignored the plain constitutional language, which guarantees a public trial to "the accused," not to the press. *Estes v. Texas*, 381 U.S. 532, 538 (1965); *Weissman v. United States*, 387 F.2d 271, 273 (10th Cir. 1967); *Geise v. United States*, 265 F.2d 659, 660 (9th Cir. 1959); *United States v. Sorrentino*, 175 F.2d 721, 722-23 (3d Cir. 1949); 1 Cooley, Constitutional Limitations 647 (8th ed. 1927). The Sixth Amendment guarantee does, of course, benefit the public by encouraging confidence in our judicial institutions, as well as the particular interest of the defendant in guarding against the arbitrary authority which is more likely exercised in private than under public scrutiny. See *In re Oliver*, 333 U.S. 257, 270 (1948).[31] But the Clause

[30]The other cases relied upon by respondents below in support of their First Amendment arguments are similarly inapposite, for each involved a restriction on what may be said or reported about a public judicial proceeding. See *Craig v. Harney*, 331 U.S. 367 (1947) (newsman held in contempt for article critical of trial judge's handling of a case); *Bridges v. California*, 314 U.S. 252 (1941) (labor official held in contempt for public criticism of judicial decision); *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 102 (5th Cir. 1974) (bar against publication of sketches of court proceedings); *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972) (newsmen held in contempt for violating judge's prohibition on reporting of testimony taken in open court).

[31]Even the right of the defendant is limited by the need to maintain order, *United States ex rel. Orlando v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965); to prevent offensive evidence from being exhibited to the general public, *Lancaster v. United States*, 293

[footnote continued]

is not a sword for the press; it confers no right to have the proceedings conducted so as to enable members of the press to cover the proceedings as they deem most suitable. See *Estes v. Texas, supra*, 381 U.S. at 583 (Warren, C.J., concurring). Justice Harlan, concurring in *Estes v. Texas, supra*, 381 U.S. at 588-89, stated the matter succinctly:

> [T]he right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. . . . A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The companion cases of *People v. Jelke*, 308 N.Y. 56, 123 N.E.2d 769 (1954), and *United Press Associates v. Valente*, 308 N.Y. 71, 123 N.E.2d 777 (1954), provide a particularly instructive application of this principle. In the *Jelke* case, the New York Court of Appeals held that an order by a trial judge excluding the press and public from the courtroom during a large part of a criminal trial had deprived the defendant of his right to a public trial. Accordingly, the court reversed his conviction on that ground. In the *Valente* case, decided the same day, the court considered the same ruling on an application

F.2d 519 (D.C. Cir. 1961); to prevent unnecessary embarrassment to a witness, *Geise v. United States*, 262 F.2d 151 (9th Cir. 1958); or to protect confidential information, *United States v. Slocum*, 464 F.2d 1180, 1184 (3d Cir. 1972); *People v. Hagan*, 24 N.Y.2d 395, 300 N.Y.S.2d 835, 248 N.E.2d 588, *cert. denied*, 396 U.S. 886 (1959).

brought by various press agencies. The court in *Valente* affirmed the dismissal of that application on the ground that the press could not invoke the defendant's right to a public trial. That right, the court held, was the defendant's and only the defendant's.

Chief Judge Fuld emphasized at the outset that the *Valente* case did not in any way involve freedom of the press. The First Amendment, the court stated (123 N.E.2d at 779):

> has . . . never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others. Judicial proceedings are viewed as 'a public event,' in the sense that 'Those who see and hear what transpired can report it with impunity.' *Craig v. Harney, supra,* 331 U.S. 367, 374. But freedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to 'see and hear what transpired.'

On the issue of the right to a public trial, the court stated that since the primary purpose of that guarantee is "safeguarding the accused against possible unjust persecution and abuse of judicial authority," it is "for the defendant alone to determine whether, and to what extent, he shall avail himself" of this right. *Id.* at 780.

Even if the respondents *could* assert the rights of the accused, the Sixth Amendment's requirements were obviously satisfied during the Watergate trial. Indeed, that proceeding may have been the most open and most publicized trial in our history. As to the tape recorded conversations desired by the respondents, each was played on equipment enabling every member of the press and public in attendance to listen through earphones installed at government expense. A less accommodating procedure for playing recorded exhibits in a criminal trial

has uniformly been held to satisfy the requirement of a public trial. See *Gillars v. United States,* 182 F.2d 962, 977 (D.C. Cir. 1950) (treason trial involving playing recorded radio broadcasts); *D'Aquino v. United States,* 192 F.2d 338, 365 (9th Cir. 1951), *cert. denied,* 343 U.S. 935 (1952) (same); *United States v. Kohne,* 358 F.Supp. 1053, 1063 (W.D. Pa.), *aff'd,* 487 F.2d 1395 (3d Cir. 1973), *cert. denied,* 417 U.S. 918 (1974) (recorded wiretap evidence heard through earphones). Because a public trial was provided to the only parties constitutionally entitled to claim it, the district court's obligations under the Sixth Amendment were thus plainly satisfied, without the need to disseminate copies of the taped conversations to the press.

III.

THE DEFERENCE DUE TO SUBPOENAED PRESIDENTIAL MATERIALS MAKES PUBLIC DISTRIBUTION OF THE TAPED CONVERSATIONS PARTICULARLY INAPPROPRIATE

We have argued above that a federal district court has no authority to disseminate copies of subpoenaed exhibit materials to the general public. Accordingly, we disagree with the ruling of the court of appeals that the question whether to provide copies of recorded exhibit materials to the public is a matter for the district court's discretion. Yet even if a district court *does* have discretion to release copies of subpoenaed materials over objection, it would not be justified in exercising that discretion in this case, for the taped materials here at issue are not just ordinary subpoenaed materials; they are recordings of confidential presidential conversations, which are entitled to a "high degree of deference" in their treatment by the courts.

In *United States v. Nixon, supra,* this Court made it clear that a district judge must deal with presidential conversations in a manner very different from the way he

would handle ordinary subpoenaed materials. The Court recognized a presumptive privilege for confidential presidential communications, based on "the values to which we accord deference for the privacy of all citizens" as well as "protection of the public interest in candid, objective and even blunt or harsh opinions in presidential decisionmaking." *Id.* at 708. Balancing these interests against the "demonstrated, specific need for evidence in a pending criminal trial," the Court held that the tapes should be produced for *in camera* inspection. Id. at 713. In so doing, however, the Court authorized only the most limited use of the conversations consistent with "the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 713.

Unlike the treatment ordinarily accorded to subpoenaed materials, the subpoenaed presidential conversations were first to be delivered to the district court for *in camera* screening. The district court was then instructed to excise all material not meeting the tests of admissibility and relevance, and to return that material to the President under seal. In handling the subpoenaed conversations, the district court was "*at all times* [to] accord to presidential records that high degree of deference suggested in *United States v. Burr.*" *Id.* at 715 (emphasis added).

Both during the trial and afterwards, Judge Sirica acted in strict accordance with this Court's directive. In an exhaustive *in camera* examination, he reviewed the entire mass of subpoenaed conversations. He then provided to the Special Prosecutor only the material he deemed relevant and admissible at trial. When the taped conversations were played in court, Judge Sirica did not attempt to prevent the press from reporting their contents, a course that would have met with substantial constitutional objections. As to the subsequent requests for taped

copies of the conversations, however, neither the needs of fairness in the criminal case nor any other constitutional imperative required the court to contribute to this further dissemination of the presidential materials. Recognizing the special status of those materials and the likelihood that they would be subjected to undignified commercial exploitation, Judge Sirica properly declined to order copies of the tapes to be made and released to the respondents.

For Judge Sirica to have done otherwise would have distorted the balance drawn by this Court in *United States v. Nixon.* In discussing the competing considerations of presidential confidentiality and the need for evidence in a criminal case, this Court stressed the limited scope of the inroad it was making on the presidential privilege. The Court did not in any way suggest that the use of the conversations in a criminal trial would mean that they could be broadcast into the living rooms of the American public and enshrined among the Top 40 best-selling phonograph records. Yet if the decision below is upheld, it will significantly alter the balance that may be struck in future cases involving confidential presidential materials. Instead of simply weighing the interest of presidential confidentiality against the need for evidence in a criminal trial, a court will have to consider as a further factor the likelihood of wholesale commercial exploitation of the subpoenaed materials. Adding this factor to the balance can only have the effect of either denigrating the presidential privilege or further narrowing the circumstances under which the privilege will be overridden.

It is hardly necessary, we trust, to review here the content of the recordings at issue. Putting aside the substance of the conversations as they relate to the Watergate affair, they contain exactly the kind of blunt,

candid, and even profane remarks that one might expect in recordings of conversations among close associates, none of whom contemplated public airing of his words. Some of the remarks are embarrassing to third parties—even to at least one head of a foreign state—and some reflect opinions perhaps not well-considered by the speaker, but which he did not expect to be replayed for the entertainment of the American public. It is true, as the respondents note, that these conversations are no longer confidential. It is also true, as they have refused to admit, that the uses to which they, and others, propose to put the recordings will constitute a far more serious intrusion on the sensibilities of those whose voices appear on the tapes than any publication of transcripts or reporting of their contents. In essence, the respondents seek to make the participants in these private conversations unwilling actors in their broadcasts and phonographic productions. As we have discussed, to do so would constitute an intrusion on the privacy of the participants and an improper disposition of property in the court's custody. But perhaps most important, it would constitute a particularly unwarranted and inappropriate treatment of confidential communications among the highest officials of a coordinate branch of government.

Nothing in *United States v. Nixon* remotely authorizes such a result, and we submit that it would be inconsistent with the spirit, if not the language, of that case to permit the commercial exploitation of the presidential conversations involved in this case. At the very least, it was entirely proper for Judge Sirica to take that factor into consideration in exercising his discretion not to grant the requested relief.

IV.

NEITHER DISTRICT COURT JUDGE ABUSED HIS DISCRETION IN DECLINING TO RELEASE COPIES OF THE TAPED CONVERSATIONS

Even on its view that the district court was authorized to release copies of the taped conversations, the court of appeals recognized that it could reverse only if it found that Judge Sirica had abused his discretion in declining to order their immediate release. Yet in spite of Judge Sirica's carefully considered decision, and in spite of the fact that Judge Gesell had earlier declined to provide copies of the conversations to the respondents, the court held that Judge Sirica had abused his discretion, and it overruled both district court judges in their determinations not to release the tapes. Because the decisions of the two district court judges did not even approach an abuse of discretion, the holding of the court of appeals was even more clearly erroneous than the legal theory underlying it.

In his December 5, 1974 opinion, Judge Gesell made it plain that he did not regard it as settled that the taped conversations should ultimately be released. Any release of the materials, he wrote, would be contingent upon a plan of distribution that would "not permit overcommercialization of the evidence" (Pet. App. 42a). In fact, Judge Gesell ultimately declined to release the tapes precisely because no satisfactory plan had been proposed by which "commercialization of the tapes or any undignified use of the material [would] be minimized" (Pet. App. 44a). The court of appeals phrased the question of the propriety of release as "whether Judge Gesell abused his discretion in deciding to permit appellants to exercise their right to inspect any copy the tapes" (Pet. App. 21a). This statement, however, ignores the fact that Judge Gesell did *not* permit the respondents

to inspect and copy the tapes. Quite the contrary, he denied their applications without prejudice.

While Judge Gesell held that the tapes should not be released as long as they might be put to improper uses, the court of appeals directed that the taped conversations must immediately be produced, regardless of the uses to which they may be put.[32] Accordingly, it is inaccurate for the court of appeals to state that it affirmed Judge Gesell in the exercise of his discretion. In fact, under the banner of approbation, it reversed Judge Gesell's decision not to release the tapes and rejected the reasons underlying it.

To the extent that the court of appeals dealt at all with the concern about possible overcommercialization and undignified use of the taped conversations, it suggested that any objection to "unseemly" public marketing of the White House conversations "is essentially a question of taste" which provides "a singularly weak basis for a court to interfere with the exercise of a long-established common law right" (Pet. App. 25a). Precisely this "question of taste," however, was at the base of each of the cases cited by the court of appeals for the proposition that a trial court may, in its discretion, close some part of its record to the public. In domestic relations cases, for example, the courts have sealed the records "in their discretion" for precisely the reason that Judge Gesell gave in this case for declining to release the taped conversations: the records would become the subject of commercialized gossip, and would be used for undignified purposes. See *C. v. C.*, 320 A.2d 717, 723 (Del. 1974); *Sanford v. Boston Herald Traveler Corp.*, 318 Mass. 156,

[32]Both the court of appeals and the respondents have concluded that it is not constitutionally possible to limit the uses—even commercial and undignified uses—to which the tapes can be put after they are released. See Pet. App. 21a n.52.

158, 61 N.E.2d 5, 6 (1945); *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893). Judge Gesell's reasons for releasing the tapes were thus entirely in harmony with the kinds of considerations that the courts have properly recognized in denying public access to court records, and the court of appeals should not have overruled him on that score.

In holding that Judge Sirica had abused his discretion, the court of appeals was more straightforward, but equally in error. Judge Sirica's primary concern, as indicated in his April 4, 1975 opinion, was the effect that immediate release of the recordings might have on the rights of the defendants in the Watergate conspiracy case. In addition, however, he took into consideration the deference owed by the courts to the Presidency, and the interests of those whose words are captured on the tapes in being free from commercial exploitation of their private conversations. Against these considerations Judge Sirica weighed the argument of the applicants in favor of the speedy release of the tapes and found it unconvincing. Under the circumstances of this case, Judge Sirica's decision cannot fairly be characterized as an abuse of discretion.

A judge in a criminal case has a heavy responsibility to conduct the proceedings in such a way as to protect against unwarranted publicity that might affect the fairness of the trial. As this Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966):

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

Judge Sirica found that the rights of the criminal defendants "might be seriously and permanently damaged as a result of granting the applicants' request for immediate release of the tapes." The respondents did not argue below that this was an improper factor for the district court's consideration. Rather, they belittled Judge Sirica's concern, and argued that he gave it too much weight. It is well established, however, that the task of assessing and minimizing the effects of prejudicial pretrial publicity is committed to the discretion of the district court. See, *e.g.*, *United States v. Nix*, 465 F.2d 90 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); *United States v. Jobe*, 487 F.2d 268 (10th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974); *Hoffa v. Gray*, 323 F.2d 178 (6th Cir.), *cert. denied*, 375 U.S. 907 (1963). In this case, Judge Sirica's judgment as to the dangers inherent in immediate release of the conversations rested on firm ground and should not have been disturbed by the court of appeals.

The tapes were perhaps the most critical evidence in the criminal case, and it was essential that they be considered by a jury only under appropriate instructions, only as a whole and not in selections, and only in conjunction with all the other evidence in the case, including the witnesses' explanations of the context, the circumstances, and the intended meaning of each statement. None of these safeguards would be or could be provided by persons broadcasting and marketing the tapes. The editing, arrangement and commentary of the marketed products would undoubtedly be accomplished, at least by some of the companies involved, in such a way as to have maximum popular appeal, and marketing would obviously be highly competitive and accompanied by sophisticated mass merchandising techniques. It is not possible, we submit, to take seriously the suggestion that potential jurors exposed to these sensations would be unaffected.

In exercising his discretion, Judge Sirica fully considered the asserted public interest in receiving information about the Watergate trial and concluded that because the content of the tapes has been made fully public, the "public's right to know" has little if any application in this case. The respondents countered this finding with the suggestion that "voice inflections, pauses and the like" have not been adequately communicated to the public. Yet whatever the marginal value that might be afforded by release of the tapes in addition to the transcripts that are already available, we submit that the "right to know" about voice inflections and pauses on the tapes hardly constitutes such a compelling factor that Judge Sirica can be said to have abused his discretion in failing to accord it more weight than the interest of the Watergate defendants in the fairness of any retrial.

In its own analysis, the court of appeals misapplied even those principles that it deemed controlling. First, the court stated that Judge Sirica's concern over the potential for prejudicial publicity was unjustified as long as retrials were "only a possibility." Yet in the same breath the court noted that one of the Watergate conspiracy convictions had been reversed, which apparently rendered a retrial of at least one of the defendants more than a mere possibility.[33] Nonetheless, the court stated that "this does not . . . alter our conclusion that interference with appellants' right to inspect and copy the tapes is not justified." (Pet. App. 17a & n.41). Second, the court took comfort in the fact that none of the Watergate defendants had filed an objection in the district court to the dissemination of the tapes. Yet at

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[33]Defendant Mardian's conviction was reversed. *United States v. Mardian*, No. 75-1383 (D.C. Cir. Oct. 12, 1976). After the court of appeals handed down its opinion in the present case, the Special Prosecutor announced that he would not seek a retrial in that case.

the same time, the court noted that one of the defendants had filed precisely that objection in the court of appeals. Nonetheless, it concluded without further ado that his objection "hardly warrants careful attention." (Pet. App. 20a & n.47). Third, the court attached importance to the Special Prosecutor's lack of formal opposition to the applications for release of the tapes. Yet the court ignored the Special Prosecutor's recommendation that the decision on release be left to the discretion of the district court, and it was similarly unmoved by the Special Prosecutor's statement that he could not be confident that "large scale commercial reproduction and sale of the tapes would have no impact on the venire at a retrial."

Although the risk of retrials in the Watergate conspiracy case has now been substantially reduced, the opinion of the court of appeals cannot thereby be retroactively redeemed. As we have noted, Judge Sirica based his conclusion in part on the same ground that troubled Judge Gesell: the risk of undignified and overly commercial use of the subpoenaed materials. In addition, Judge Sirica relied on the "solemn responsibility" to treat presidential records with particular deference, a factor that does not turn on whether the criminal convictions are final or not. And finally, because the opinion of the court of appeals gave such hostile treatment to the trial judge's efforts to reduce the risk of prejudicial publicity in a criminal trial, this Court must not allow that precedent to stand, even if the risk of prejudice has now passed. Judge Sirica properly denied the respondents copies of the subpoenaed materials, and his decision should be upheld by this Court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals in this case should be reversed.

Respectfully submitted,

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